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Filing date: **04/26/2009**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91162780
Party	Defendant KEITH CANGIARELLA
Correspondence Address	KEITH CANGIARELLA 331 N. HARRINGTON DRIVE FULLERTON, CA 92831 UNITED STATES 1mib@dreamweaverstudios.com, kccandrgrn@sbcglobal.net, lgllc@bottlemeamessage.com
Submission	Other Motions/Papers
Filer's Name	Keith Cangiarella
Filer's e-mail	lgllc@bottlemeamessage.com
Signature	/Keith Cangiarella/
Date	04/26/2009
Attachments	comp motion for declaration.pdf (16 pages)(59743 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Trademark Application Serial No.: 78/229,875 Mark: MESSAGE IN A BOTTLE MESSAGE IN A BOTTLE, INC., a California corporation, Opposer, v. KEITH CANGIARELLA, Applicant.	Opposition No. 91162780 Cancellation No. _____
----- In the Matter of Trademark Registration No.: 2,243,269 Mark: MESSAGE IN A BOTTLE KEITH CANGIARELLA, Petitioner, v. Message in a Bottle, Inc, Assignee	

**APPLICANT KEITH CANGIARELLA’S MOTION SEEKING
PERMISSION OF THE BOARD TO FILE THE
APPLICANT’S TESTIMONY AS AN AFFIDAVIT/ DECLARATION
"PRO SE"**

INTRODUCTION

Applicant Keith Cangiarella (“applicant”) hereby moves, pursuant to TMEP section 1072, 37 CFR 2.146 (a) (5), invoking the discretionary power of the Director, for permission of the Board to enable the applicant to file the applicant’s testimony in the form of affidavit /declaration. Applicant hereby affirms the existence of extraordinary circumstances and that it would not cause any injury to any other party. The applicant also affirms that the remedy sought for is only the waiver of requirements of the rules and not a requirement of the Act of 1946.

FACTS

The current proceedings have been pending before the Board since October 2004 when the opposer MESSAGE IN A BOTTLE INC. originally named as GOLD SHELLS INC. filed its opposition against the applicant. Subsequently two motions were filed by the applicant on July 5, 2006 and August 20, 2007 before the Board for summary judgment which were denied by the Board on account of existence of genuine issues of material facts. Vide its order dated March 17, 2009, the Board reopened the testimony period of the applicant and this stand to close on May 18, 2009. This order of the Board was in pursuant to a motion of the opposer to the Board to strike applicant's testimonial declaration and sur reply which was granted in its entirety. On April 2, 2009 opposer filed a motion for the partial reconsideration of the Board's decision of March 17, 2009 in which incurrence of huge expenditure by the opposer in relation to the conduct of this opposition was alleged. The motion was refused by the Board by an order dated 20 April 2009. Hence this opposition petition stands posted for the testimony of the applicant.

Pursuant to this the applicant approached the opposer for a stipulation to enable the applicant to file his testimony in the form of an affidavit/ declaration between April 20 - April 23 2009 by fax/ email but such a request was refused by the opposer raising lame excuses. The applicants emails/ faxes in this regard and the opposer's reply is attached hereto this motion for the kind consideration of the Board.

Further it was, pursuant to continuous try by the applicant to reach the opposer by fax and its failure, intimated by the opposer that he would not be available on fax for a period ranging from April 20 - 23 and April 26 - May 7 and that the applicant could contact him on email. It is humbly submitted that the opposer, as a matter of professional courtesy, could have intimated the above matter to the applicant beforehand so that he would have planned his dispatches accordingly.

ARGUMENTS

A. Under the TBMP rules, a stipulation is necessary to enable a party to file his testimony by way of an affidavit/ declaration.

Section 501.02 TBMP rules, Stipulation which require action or consideration by the Board...such as a stipulation relating to the form of testimony, must be filed with the Board.

In *Boyd's Collection Ltd. V. Herrington Co.* 65 USPQ 2d 2017 (TTAB 2003), it was held that testimony may not be submitted in affidavit or declaration form except upon stipulation of the parties approved by the Board or upon prior motion granted by the Board.

Hence by this decision and as per the TBMP rules, a stipulation by the parties or prior motion of the Board granting such permission is necessary for a party to file testimony as an affidavit/ declaration.

The opposer in his motion before the Board for partial reconsideration of the decision of the Board dated March 17, 2009, has stated that he had incurred huge expenditure in regard to the conduct of the opposition. It was in pursuant to his remark and also to reduce the cost from his side, the applicant approached the opposer for a stipulation to file testimony as an affidavit/ declaration. However the opposer denied concurring with such a stipulation even after repeated requests from the applicant.

In *Oxy Metal Industries Corp. V. Transene Co.* 196 USPQ 845, 847 n. 20 (TTAB 1977) it was held that, stipulation to presentation of evidence by affidavit reduces cost of litigation.

Hence the refusal on the part of the opposer to enter into such a stipulation is viewed by the applicant as a ploy to cause unnecessary hardship to the applicant and thus delay the proceedings.

B. The applicant is acting pro se in this proceeding. Hence the applicant is faced with practical difficulty in the conduct of the trial testimony other than by way of filing the testimony as a declaration/ affidavit. Also unavoidable circumstances as the Board and the opposer are well aware, an immediate family member was recently diagnosed with cancer and has begun treatment, daily visit by the Applicant improve their spirits also exist which force the applicant to apply to the Board for this remedy.

C. Further it was, pursuant to continuous try by the applicant to reach the opposer by fax and its failure, intimated by the opposer that he would not be available on fax for a period ranging from April 20 - 23 and April 26 - May 7 and that the applicant could contact him on email. It is humbly submitted that the opposer, as a matter of professional courtesy, could have intimated the above matter to the applicant beforehand so that he would have planned his dispatches accordingly. This delayed the applicant in approaching the Board for this remedy. Hence this forbearance to act on the part of the opposer is viewed by the applicant as a ploy to delay the proceedings.

D. The opposer is acting intentionally so as to cause hardship to the applicant in regard to providing his testimony by way of an affidavit/ declaration. Hence, it is humbly submitted that, all the above constitute extraordinary circumstances under which the applicant is forced to approach the Board for this remedy.

E. The applicant also humbly state that the requirement as to stipulation is the requirement of the rules and not a requirement under the Act, 1946.

Under 37 CFR 2.148 : The Director may suspend certain rules : In extraordinary circumstances, when justice requires and no other party is injured thereby, any requirement of the rules in this part not being a requirement of the statute may be suspended or waived by the director.

The applicant humbly submits that this is on account of existence of extraordinary circumstances as stated above, the applicant is forced to approach the Board, the applicant has no intention to injure any party as a result of this motion. The applicant also affirms that no other party will be injured in this regard

CONCLUSION

For the reasons set forth, the applicant most respectfully request the Board to pass an order facilitating the applicant to file his testimony by way of an affidavit/ declaration at the earliest so as to enable the applicant to file his testimony within the permitted trial period.

Dated : April 26, 2009

Respectfully Submitted,

A handwritten signature in black ink, reading "Keith Cangiarella", written over a horizontal line.

KEITH CANGIARELLA
"Pro Se"
331 N. Harrington Dr
Fullerton, CA. 92831

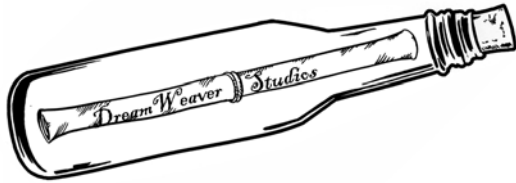
Certificate of Service

I hereby certify that a copy of the foregoing APPLICANT KEITH CANGIARELLA'S MOTION SEEKING PERMISSION OF THE BOARD TO FILE THE APPLICANT'S TESTIMONY AS AN AFFIDAVIT/ DECLARATION was first class mailed to Mr. Peter H. Smith Attorney at law, 1535 J Street, Suite A., Modesto, CA. 95353 on April 27, 2009.

A handwritten signature in black ink, reading "Keith Cangiarella", written over a horizontal line.

KEITH CANGIARELLA
"Pro Se"
331 N. Harrington Dr
Fullerton, CA. 92831

Date : April 27, 2009



Keith Cangiarella
DreamWeaver Studios
331 N. Harrington Dr
Fullerton, CA. 92831
714 – 441-3442
270-817-4195 efax
lgllc@bottlemeamessage.com

April 21, 2009

Subject : Request for the conduct of testimony by declaration.
Reference : Opposition Number 91162780 pending before the TTAB.

This is with reference to opposition number 91162780 pending before the TTAB. Let me, most respectfully, submit that both the parties have incurred heavy expenditure in defending his own cause with regard to this opposition. As a measure to reduce the cost on both sides, I would, most humbly, suggest the conduct of a testimony by declaration from my side. This way, both of the parties would be able to save our valuable time, energy and money. Any cooperation in this regard will be highly appreciated by I.

If you are willing to stipulate to this, I will draft a stipulation and fax it back to you. Your prompt reply to this would be appreciate no later than 4pm p.s.t, in writing by fax

If the above cost and time saving measure in not accepted by your side, I will be compelled to approach the Board in this regard.

Respectfully,

Keith Cangiarella

Subject: 10 Am
From: Legal Department <lgllc@bottlemeamessage.com>
Date: Tue, 21 Apr 2009 10:15:44 -0700
To: Peter Smith <peterhsmith@sbcglobal.net>

Hello Mr. Smith,

Your fax machine at 1-209-579-9940 is not answering at 10am in the morning, would you be willing to stipulate to communication via email, as having a fax machine that does not answer does not allow me to communicate with you in prompt fashion.
I can draft that as well.
I shall try again later in the day.

Respectfully,

Keith Cangiarella

Subject: Tried to fax this
From: Legal Department <lgllc@bottlemeamessage.com>
Date: Tue, 21 Apr 2009 10:06:59 -0700
To: Peter Smith <peterhsmith@sbcglobal.net>

Mr. Smith,

Please find below what I am attempting to fax you. I shall send a second email with a pdf and attempt to fax again,

Respectfully,

Keith Cangiarella

Keith Cangiarella

DreamWeaver Studios

331 N. Harrington Dr

Fullerton, CA. 92831

714 - 441-3442

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Respectfully,

Keith Cangiarella

Subject: Re: Tried to fax this
From: Peter Smith <peterhsmith@sbcglobal.net>
Date: Tue, 21 Apr 2009 23:22:20 -0700 (PDT)
To: Legal Department <lgllc@bottlemeamessage.com>

I have received your letter. I am out of town and there is no one in my office to turn on the fax machine until this Friday, but I will continue to check my email at least daily.

I can't give you a response to your letter without discussing it with my client. I will try to reach him Wednesday or as soon as possible and get back to you.

Peter Smith

From: Legal Department <lgllc@bottlemeamessage.com>
To: Peter Smith <peterhsmith@sbcglobal.net>
Sent: Tuesday, April 21, 2009 10:06:59 AM
Subject: Tried to fax this

Mr. Smith,

Please find below what I am attempting to fax you. I shall send a second email with a pdf and attempt to fax again,

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Keith Cangiarella

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If you are willing to stipulate to this, I will draft a stipulation and fax it back to you. Your prompt reply to this would be appreciate no later than 4pm p.s.t, in writing by fax

If the above cost and time saving measure in not accepted by your side, I will be compelled to approach the Board in this regard.

Respectfully,

Subject: Re: Tried to fax this
From: Legal Department <lgllc@bottlemeamessage.com>
Date: Wed, 22 Apr 2009 09:13:50 -0700
To: Peter Smith <peterhsmith@sbcglobal.net>

Thank you for your reply, you should have advised you were going to be unavailable. If time is tight we may have to stipulate to a lengthening of the testimony period.

I appreciate your response, will you stipulate to communication via email.

Enjoy you time away, please try to have a response no later than Wednesday, thank you.

Mr. Keith Cangiarella

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

KEITH CANGIARELLA
331 N. HARRINGTON DRIVE
FULLERTON, CA 92831
lgllc@bottlemeamessage.com
714-441-3442

KEITH CANGIARELLA
(applicant/ petitioner)

MESSAGE IN A BOTTLE INC.
(opposer/ registrant)

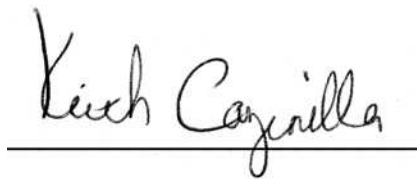
Opposition number : 91162780

Stipulation Re : Testimonial Evidence via affidavit

Applicant Keith Cangiarella, opposer MESSAGE IN A BOTTLE INC. and the attorney on record of the opposer, Peter H. Smith, stipulate and agree as follows :

1. That both of the parties have incurred huge expenditure in defending his own cause with regard to the above proceedings.
2. That the opposer or his attorney has no objection to the filing of the applicant's testimony by way of declaration/affidavit as a measure to reduce the cost of the proceedings and also as a time saving measure.

Dated this the 22 day of April 2009.

A handwritten signature in dark ink, reading "Keith Cangiarella", is written over a horizontal line.

Keith Cangiarella

Peter H Smith
1535 J Street, Suite A
Modesto, CA 95354
(209) 579-9524

Subject: Re: Drafted stipulation to save you time and your client money
From: Peter Smith <peterhsmith@sbcglobal.net>
Date: Wed, 22 Apr 2009 16:38:50 -0700 (PDT)
To: Legal Department <lgllc@bottlemeamessage.com>

I have discussed this matter with my client, and I am not authorized to enter into your proposed stipulation or to the conducting of a deposition by written questions. Also, I do not stipulate to receiving required notices by email, though as a practical matter, I will continue to communicate with you by email on an informal basis as has been done in the past.

Peter Smith

From: Legal Department <lgllc@bottlemeamessage.com>
To: Peter Smith <peterhsmith@sbcglobal.net>
Sent: Wednesday, April 22, 2009 4:07:49 PM
Subject: Drafted stipulation to save you time and your client money

Hello Mr. Smith,

I have taken the time and drafted the stipulation, all you have to do is sign and return, your client will not have to spend any extra money. I understand, and am doing my part to aid as best I can.

Respectfully,

Mr. Keith Cangiarella

No virus found in this incoming message.

Checked by AVG - www.avg.com

Version: 8.0.238 / Virus Database: 270.12.2/2074 - Release Date: 04/22/09 08:49:00

Subject: Re: Drafted stipulation to save you time and your client money
From: Legal Department <lgllc@bottlemeamessage.com>
Date: Wed, 22 Apr 2009 18:46:32 -0700
To: Peter Smith <peterhsmith@sbcglobal.net>

It appears you have misunderstood the stipulation, it is a stipulation to I to testify via a Declaration or Affidavit, not by written questions.

Your client has put forth previously a motion stating the financial burden this case has caused. I wish to ease your clients financial burden by testifying via an affidavit or Declaration.

I am doing this to ease the financial burden of your client, as you stated during the teleconference your client has been hit by the recession and financial burdens are great.

It appears you have miss understood, never mentioned the conducting a deposition by written questions.

Lastly, a fax or email from you would have been a professional courteousy advising you would be unavailable the first week of my testimony period. We may need to stipulate to addition time or I will have to file a motion with the Board.
Your prompt reply appreciated.

Respectfully,

Keith Cangiarella

stipulation for declaration.pdf

Content-Type: application/pdf
Content-Encoding: base64

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

KEITH CANGIARELLA
331 N. HARRINGTON DRIVE
FULLERTON, CA 92831
lgllc@bottlemeamessage.com
714-441-3442

Mr. Smith

Subject : Request for a stipulation permitting the applicant to file his testimony by way of declaration / affidavit.

Reference : Opposition number 91162780 pending before the Board and applicants letter dated 22 day of April 2009.

Please take note that the former request of the applicant with regard to filing the testimony by declaration was met with a refusal from your side. Hence the applicant is compelled to submit the underlying request once again for your kind consideration.

Under section 702 TBMP rules : Parties may enter into a wide variety of stipulations concerning.....that testimony may be submitted in the form of affidavit.

In Oxy metal industries Corp. V. Transene Co. 196 USPQ 845, 847 n.20 (TTAB 1777), it was pointed out that stipulation to presentation of evidence by affidavit reduces the cost of litigation.

In Boyds Collection Ltd. V. Harrington Co. 65 USPQ 2d 2017 (TTAB) it was pointed out that testimony may not be submitted in affidavit or declaration form except upon stipulation of the parties approved by the board or upon prior motion granted by the board.

It is humbly submitted that applicant is representing his case himself. He also have an immediate family member afflicted by cancer who needs continuous attention. These events have prompted the applicant to approach the opposers mercy.

Also, it is humbly submitted that both the parties have incurred huge expenses in conducting his own cause. The request for this stipulation is the result of the applicants sincere belief that it would considerably reduce the time and cost of the proceedings.

The applicant takes this opportunity to declare that he would permit the conduct of the opposer's testimony by way of filing a declaration/ affidavit during the pendency of the testimony period of the opposer.

In case the opposer does not agree to a stipulation the applicant would be compelled to approach the Board for appropriate remedy.

The applicant would be most obliged by any favorable decision from the opponent.

Your prompt reply requested, I have also attached the last two letters I sent, via email so you have a hard copy.

Respectfully,

A handwritten signature in black ink, reading "Keith Cangiarella", is written over a horizontal line.

Keith Cangiarella

Subject: Proposed Stipulation

From: Peter Smith <peterhsmith@sbcglobal.net>

Date: Fri, 24 Apr 2009 15:40:06 -0700

To: Keith Cangiarella <lgllc@bottlemeamessage.com>

I received your faxed letter and materials today and forwarded them to my client. Roger Rojas and I are truly sorry for your family troubles, and you have our condolences, but our position in regard to your proposed method of testimony has not changed and I am not authorized to agree to your proposed stipulation.

Please be advised that no one will be in my office to receive mail and my fax machine will not be functioning from April 26 through May 6, 2009. Therefore, if you have further communications of any kind during that period, including any notices for which service on me is required by TTAB rules, please send them by email (as well as by the usual mail notice in the case of required service), as I will be checking my email during that period.

Peter Smith

No virus found in this incoming message.

Checked by AVG - www.avg.com

Version: 8.0.238 / Virus Database: 270.12.4/2078 - Release Date: 04/24/09 07:54:00